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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IN RE AIR CRASH DISASTER AT WARSAW, POLAND, ON MARCH 14, 1980, MDL-441

POLSKIE LINIE LOTNICZE
(LOT Polish Airlines),

Petitioner,

v.

ANGELA Y. ROBLES, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Restated

Whether the Court should exercise its discretion and grant the petition for writ of certiorari to review a long settled issue relating to treaty interpretation when the Court has in the past declined to review the issue in substantially identical circumstances and where the matter is not ripe for review and the interpretation urged by petitioner would not justify reversal of the judgment of the lower court?

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NO.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Preliminary Statement

This Brief in Opposition to the Petition by Polskie Linie Lotnicze (LOT) for Writ of Certiorari is respectfully submitted on behalf of respondents named in seven

of the eight individual actions[1] and, as Lead Counsel for plaintiffs in the cases consolidated under Multidistrict Litigation Docket No. MDL-441, on behalf of the other identically affected litigants whose related passenger death actions arise out of the LOT air disaster and are subject to the consolidation and transfer order of the Judicial Panel on Multidistrict Litigation.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 705 F.2d 85 (2d Cir. 1983). The opinion of the United States District Court for the Eastern District of New York is reported at 535 F. Supp. 833 (E.D.N.Y. 1982).

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered April 8, 1983. The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1254(1) (1976).

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[1] Respondents represented herein are next of kin of decedents Elliott Chavis, Stephen J. Smiegel, George Pimental, Joseph F. Bland, Ray L. Wesson, his wife Delores A. Wesson, John Radison and Byron M. Lindsay, each of whom was an American citizen traveling under the auspices of the United States Amateur Athletic Union (AAU) in connection with a boxing tournament that was scheduled to be held in Warsaw, Poland between the AAU Boxing Team and the national team of Poland.

Treaties and Regulation Involved

WARSAW CONVENTION*

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he

* 49 Stat. 3000; T. S. 876; 137 LNTS 11.

proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

MONTREAL AGREEMENT

1966

AGREEMENT RELATING TO LIABILITY LIMITATIONS OF THE WARSAW CONVENTION AND THE HAGUE PROTOCOL

The undersigned carriers (hereinafter referred to as "the Carriers") hereby agree as follows:

1. Each of the Carriers shall effective May 16, 1966, include the following in its conditions of carriage, including tariffs embodying conditions of carriage filed by it with any government:

> The Carrier shall avail itself of the limitation of liability provided in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw October 12th, 1929, or provided in the said Convention as amended by the Protocol signed at The Hague September 28th, 1955. However, in accordance with Article 22

(1) of said Convention, or said Convention as amended by said Protocol, the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention or said Convention as amended by said Protocol, which, according to the Contract of Carriage, includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place.

(1) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.

(2) The Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol.

Nothing herein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has wilfully caused damage which resulted in death, wounding, or other bodily injury of a passenger.

2. Each carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention, or the Convention as amended by the Hague Protocol, and by the special contract described in paragraph 1, the following notice, which shall be printed in type at least as large as 10 point modern

type and in ink contrasting with the stock on (i) each ticket; (ii) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope:

ADVICE TO INTERNATIONAL PASSENGER ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country or origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of certain (name of carrier) and certain other carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed US $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US $8,290 or US $16,580.

The names of Carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative.

3. This Agreement shall be filed with the Civil Aeronautics Board of the United States for approval pursuant to Section 412 of the Federal Aviation Act of 1958, as amended, and filed with other governments as required. The Agreement shall become effective upon approval by said Board pursuant to said Section 412.

4. This Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with said Civil Aeronautics Board.

5. Any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to said Civil Aeronautics Board and the other Carriers parties to the Agreement.

_____

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_____

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_____

14 C.F.R. §221.175 (1982)

§221.175 Special notice of limited liability for death or injury under the Warsaw Convention.

(a) In addition to the aforesaid requirements of this subpart, each air carrier and foreign air carrier which, to any extent, avails itself of the limitation on liability to passengers provided by the Warsaw Convention, shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention and whose place of departure or place of destination is in the United States, the following statement in writing:

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATIONS OF LIABILITY

Passengers embarking upon a journey involving an ultimate destination or a stop in a country other than the country of departure are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to their entire journey including the portion entirely within the countries of departure and destination. The Convention governs and in most cases limits the liability of carriers to passengers for death or personal injury to approximately $10,000.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention. For further information please consult your airline or insurance company representative.

Provided, however, That when the carrier elects to agree to a higher limit of liability to passengers than that provided in Article 22(1) of the Warsaw Convention, such statement shall be modified to reflect the higher limit. The statement prescribed herein shall be printed in type at least as large as 10-point modern type and in ink contrasting with the stock on: (1) Each ticket; (2) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (3) the ticket envelope; *And provided further,* That a carrier which has heretofore been furnishing a statement including either the sum of "$8,290" or the sum of "$9,000," in place of the sum of "$10,000" in the text of the statement prescribed by this paragraph, may continue to use such statement until July 15, 1974.

(b) Each air carrier and foreign air carrier which, to any extent, avails itself of the limitation on liability to passengers provided by the Warsaw Convention, shall also cause to be displayed continuously in a conspicuous public place at each desk, station, and position in the United States which is in the charge of a person employed exclusively by it or by it jointly with another person, or by any agent employed by such air carrier or foreign air carrier to sell tickets to passengers whose transportation may be governed by the Warsaw Convention and whose place of departure or destination may be in the United States, a sign which shall have printed thereon the statement prescribed in paragraph (a) of this section: *Provided, however,* That an air carrier, except an air taxi operator subject to Part 298 of this subchapter, or foreign air carrier which provides a higher limitation of liability than that set forth in the Warsaw Convention and has signed a counterpart of the agreement among carriers providing for such higher limit, which agreement was approved by the Board by Order E-23680, dated May

13, 1966 (31 FR 7302, May 19, 1966), may use the alternate form of notice set forth in the proviso to §221.-176(a) of this chapter in full compliance with the posting requirements of this paragraph. *And provided further,* That an air taxi operator subject to Part 298 of this subchapter, which provides a higher limitation of liability than that set forth in the Warsaw Convention and has signed a counterpart of the agreement among carriers providing for such higher limit, which agreement was approved by the Board by Order E-23680, dated May 13, 1966 (31 FR 7302, May 19, 1966), may use the following notice in the manner prescribed above in full compliance with the posting requirements of this paragraph.

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

> Passengers traveling to or from a foreign country are advised that airline liability for death or personal injury and loss or damage to baggage may be limited by the Warsaw Convention and tariff provisions. See the notice with your ticket or contact your airline ticket office or travel agent for further information.

Such statements shall be printed in bold faced type at least one-fourth of an inch high.

(Sec. 402, 72 Stat. 757; 49 U.S.C. 1372)

[ER-708, 36 FR 22229, Nov. 23, 1971, as amended by ER-837, 39 FR 8319, Mar. 5, 1974; ER-844, 39 FR 16120, May 7, 1974]

Respondents' Counter Statement of the Case

Unlike the transportation considered by the Canadian Supreme Court in *Ludecke* v. *Canadian Pacific Airlines, Ltd.*, 98 D.L.R.3d 52 (Can. 1979), Pet. App. 50a, or that made the subject of the Second Circuit's opinion in *Lisi* v. *Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508 (2d Cir. 1966), *affirmed by an equally divided court,* 390 U.S. 455 (1968), *reh'g denied,* 390 U.S. 929 (1968), the transportation in question, which tragically resulted in the deaths of all aboard petitioner's aircraft, was governed not only by the provisions of the treaty commonly referred to as the Warsaw Convention[2] but also by "special contracts of carriage" called the Montreal Agreement[3], *Lowenfeld Aviation Law,* 2d Ed. § 5.42, pp. 7-143-144, M. Bender, N.Y. (1981). Since petitioner held a foreign air carrier permit issued by the Civil Aeronautics Board (CAB) pursuant to section 402 of the Federal Aviation Act, 49 U.S.C. § 1372 (1976 & Supp. IV 1980), LOT's compliance with the terms of the Montreal Agreement was also a condition to its operation in the United States as a foreign carrier, 14 C.F.R. Appendix to Part 211 § 10(h)(1); and see the copy of LOT's foreign air carrier permit in the Appendix to this Brief at page App. 1a.

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[2] Concluded in Warsaw, Poland in 1929 and ratified by the U.S. Senate in 1934, the Warsaw Convention is officially titled "A Convention for the Unification of Certain Rules Relating to International Air Transportation and Additional Protocol" [49 Stat. 3000, *et seq.*].

[3] The official title of the Montreal Agreement is "Agreement Relating to Liability of the Warsaw Convention and Hague Protocol" [Agreement CAB 18990, Approved by Executive Order E-23680 of May 13, 1966 (31 Fed. Reg. 7302)].

The events leading to and the circumstances surrounding the inception, acceptance and eventual execution of the Montreal Agreement are narrated by Professor Andreas F. Lowenfeld, the Agreement's author, in his Treatise on aviation law, *Lowenfeld, Aviation Law* 2 Ed., *supra* §§ 5.2 to 5.42. A more concise background summary appears in the opinion of the Circuit Court, 705 F.2d 85, 86-88 (Pet. App. 8a-9a); *see also,* Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention,* 80 Harv. L. Rev. 497, 546-52, 586-97 (1967) and *Speiser and Krause, Aviation Tort Law,* Vol. 1, § 11:19, pp. 674-680, Lawyers Cooperative Pub. Co., Rochester (1978).

In sum, the Montreal Agreement arose out of dissatisfaction on the part of the United States with the passenger liability limits contained in Article 22(1) of the Warsaw Convention (approximately $8300) and as increased under the Hague Protocol of 1955 (approximately $16,600) to which the United States did not adhere. To induce the United States to withdraw the denunciation of the Treaty that was to take effect on May 15, 1966, the air carriers of the world, including petitioner, agreed not only to waive Article 20(1) defenses up to a limit of $75,000 per passenger injury but also to ". . . furnish to each passenger . . . notice [of treaty limits] . . . printed in type at least as large as 10 point modern type. . . ." *Reed* v. *Wiser,* 555 F.2d 1087 (2d Cir. 1980), *cert. denied,* 434 U.S. 922 (1981); *Dunn* v. *Trans World Airlines,* 589 F.2d 408 (9th Cir. 1978); *In Re Air Crash in Bali, Indonesia,* 462 F. Supp. 1114, 1123-24 (C.D. Cal. 1978), *rev'd on other grounds,* 684 F.2d 1301 (9th Cir. 1982); *Husserl* v. *Swiss Air Transport Co., Ltd.,* 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd,* 485 F.2d 1240 (2d Cir. 1973); *see also* 50 Dept. State Bull. 923 (1965); Dept. State Press Release Nos. 110 and 111, May 13 and 14, 1966; 54 Dept.

of State Bull. 955-57 (1966); CAB Press Release 66-61 5/13/66.

The district court's dismissal of petitioner's treaty defenses, 535 F. Supp. 833 (E.D.N.Y. 1982)[4] and the unanimous affirmance thereof by the Court of Appeals, 705 F.2d 85 (2d Cir. 1983)[5] were based on the undisputed fact that LOT's tickets did not meet the condition precedent in the Montreal Agreement requiring that notice of treaty limitations be furnished in print size no less than 10 point modern type. The same print size specification has been mandated by the CAB since 1963, 14 C.F.R. 221.175 and, in the interim, has been approved, *Deutsche Lufthansa Aktiengesellschaft* v. *C.A.B.*, 379 F.2d 912, 917-918 (D.C. Cir. 1973) or cited favorably by the Circuit Courts, *Lisi* v. *Alitalia*, 370 F.2d 508, 514 n.10 (2d Cir. 1966); *Stratis* v. *Eastern Air Lines, Inc.*, 682 F.2d 406, 413 n.10 (2d Cir. 1982); *In Re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 705 F.2d at 90 n.11; (Pet. App. 13a, n.11 and 14a). The applicability of and the lower courts' reliance upon the Montreal Agreement distinguishes this from the *Lisi* and *Ludecke* cases which were concerned solely with an interpretation of the Warsaw Convention. As observed by the Court of Appeals, "[W]hatever merit LOT's argument might have

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[4] Per Hon. Charles P. Sifton who is the trier of the facts as well as the law. This because petitioner, despite its prior waiver of sovereign immunity as a condition to operating in the United States, successfully moved to strike respondents jury demands pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.*, 535 F. Supp. at 836 (E.D.N.Y. 1982).

[5] The Second Circuit Panel was comprised of C.J. Oakes, the author of the majority opinion in *Stratis* v. *Eastern Air Lines, Inc.*, 682 F.2d 406 (2d Cir. 1982), C.J. Sloviter, of the 3d Circuit sitting by designation and C.J. Kearse.

were we considering the adequacy of notice solely under the Warsaw Convention, the fact remains that we are not," 705 F.2d at 89, (Pet. App. 11a).

Based on Petitioner's perception of Footnote 2 to the opinion of the Court of Appeals (Pet. App. 3a) and the reference therein to the Circuit Court's holding in *Stratis* v. *Eastern Air Lines, Inc.*, 682 F.2d 406, petitioner was granted leave by the district court to conduct discovery with respect to the modes of transportation used by decedents in their travel to New York for the flight in question and with respect to the adequacy of notice, if any, received by decedents during the course of such prior unconnected transportation. Pending completion of such discovery in the Fall, summary judgment in at least three companion passenger actions has been withheld so that petitioner may perfect its record and seek further clarification from the Court of Appeals.

REASONS FOR DENYING THE WRIT

1. The matter is not ripe for review nor is it important enough to warrant the exercise of the Court's discretion.

In the 17 years since *Lisi* v. *Alitalia,* 370 F.2d 508, was decided, the airline industry has replenished its supply of *Lisi* like ticket stock with tickets that conform to the print size specifications of the Montreal Agreement and the Board's Rules. Although the *Ludecke* case was decided by the Canadian Supreme Court in 1979, it arose out of a crash that occurred in Tokyo on March 4, 1966 and thus involved a circumstance that is not likely to reoccur in an American court[6]; *i.e.,* a notice question based on undersized print in a ticket that is subject to the Warsaw Convention but not to the Montreal Agreement or the Hague Protocol.[7] Had either the Montreal Agreement or the Hague Protocol applied to passenger Ludecke's transportation, the carrier's Warsaw defenses would have been stricken as was done in the action for the death of a fellow passenger, *Montreal Trust Company, et al.* v. *Canadian Pacific Airlines, Ltd.,* 72 D.L.R. 3d

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[6] The same crash gave rise to the Second Circuit Opinion in *Smith* v. *Canadian Pacific Airlines, Ltd.,* 452 F.2d 798 (2d Cir. 1971).

[7] Passenger actions lacking sufficient *nexus* with the United States for the purposes of the Montreal Agreement are subject to dismissal under Article 28 for lack of subject matter jurisdiction, *Gayda* v. *LOT,* 702 F.2d 424 (2d Cir. 1983), citing *Smith* v. *Canadian Pacific,* 452 F.2d 798. Cases subject to the notice requirements of the Hague Protocol are governed by the holding in *Lisi* rather than *Ludecke.* See opinion of the Supreme Court of Canada in *Montreal Trust Co. et al.* v. *Canadian Pacific Airlines Ltd.,* 72 D.L.R.3d 257 (1976), (App. 10a).

257, 14 Avi. Cas. (CCH) 17,510 (Sup. Ct. of Canada 1976). Accordingly, the conflict between the *Ludecke* and *Lisi* cases is limited in significance to historic and academic interest.

Petitioner has not shown that conformity to the modern standard expressed in the Board's Rules and the Montreal Agreement presents a problem to the airline industry at large or to petitioner in particular. Unlike the ticket format cases decided in the wake of *Lisi* v. *Alitalia,* 370 F.2d 508, the Second Circuit's holding in this case is not addressed to ticket stock used throughout the industry but to an extraordinary anomaly in a batch of LOT's tickets which, according to Petitioner, resulted from an unintended reduction in print size during offset reproduction (App. 8a).

To the extent that petitioner intends to seek clarification from the Court of Appeals with respect to the scope and import of Footnote 2 to the lower court's opinion, 705 F.2d at 86 (Pet. App. 3a), the matter is also not ripe for consideration by this Court.

2. Petitioner presents nothing to warrant re-examination of an issue resolved in conformity with well settled law by a unanimous panel comprised of members of two Circuits which issue the Court has previously declined to review in substantially identical circumstances.

The decision of the Canadian Supreme Court in *Ludecke* v. *Canadian Pacific Airlines, Ltd.*, is not only anachronistic, *Montreal Trust Co.* v. *Canadian Pacific Airlines, Ltd.*, 72 D.L.R.3d 257, 14 Avi. Cas. (CCH) 17,510 (Sup. Ct. Canada 1976), it is also against the grain of American jurisprudence and the overwhelming weight of

case authority, *Lisi* v. *Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508 (2d Cir. 1966); *Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965), *cert. denied*, 383 U.S. 816 (1965), *reh'g denied*, 382 U.S. 933 (1965); *Warren* v. *Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965); *Manion* v. *Pan American World Airways*, 55 N.Y. 2d 398, 434 N.E.2d 1060, 449 N.Y.S.2d 693 (1982); *Bayless* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig)*, 10 Avi. Cas. (CCH) 17,881 (S.D.N.Y. 1968); *Eck* v. *United Arab Airlines, Inc.*, 12 Avi. Cas. (CCH) 18,427 (N.Y. Sup. Ct. 1974); *Boryk* v. *Aerolineas Argentinas*, 332 F. Supp. 405 (S.D.N.Y. 1971); *Burdell* v. *Canadian Pacific Airlines, Ltd.*, 10 Avi. Cas. (CCH) 18,151 (Ill. Cir. Ct. 1968); *Demanes* v. *Flying Tiger Line Inc.*, 10 Avi. Cas. (CCH) 17,611 (N.D. Cal. 1967); *Glassman* v. *Flying Tiger Line, Inc.*, 10 Avi. Cas. (CCH) 18,296 (N.D. Cal. 1966).

Following denial of rehearing in *Lisi* v. *Alitalia*, 370 F.2d 508, the Court declined to review the issue presented by LOT's petition herein under substantially identical circumstances, *Egan* v. *Kollsman Instrument Corp.*, 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967), *cert. denied*, 390 U.S. 1039 (1968).

3. Changing the rule in *Lisi* v. *Alitalia*, will not affect the holding of the Court of Appeals in this case.

As stated previously, *Lisi* v. *Alitalia*, 370 F.2d 508 was decided without reference to the Montreal Agreement or to the comparable notice requirements of the Hague Protocol, *Montreal Trust Co.* v. *Canadian Pacific*, (App. 10a). Reconsideration of the holding in *Lisi*, as urged by petitioner, would not affect the *ratio decidendi* of the lower court in this case, 705 F.2d at 89, (Pet. App. 11a).

CONCLUSION

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: July 30, 1983

[APPENDIX FOLLOWS]

APPENDIX

APPENDIX

LOT Foreign Air Carrier Permit

SPECIMEN PERMIT

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

PERMIT TO FOREIGN AIR CARRIER
(as amended)

POLSKIE LINIE LOTNICZE (LOT)

is authorized, subject to the provisions set forth, the provisions of the Federal Aviation Act of 1958, as amended, and the orders, rules, and regulations of the Board, to engage in foreign air transportation of persons, property, and mail, as follows:

> Between a point or points in Poland via intermediate points in Denmark, the Netherlands, Belgium, France or the United Kingdom and Montreal Canada; and the terminal point New York, New York.

The holder shall be authorized to engage in charter trips in foreign air transportation, subject to the terms,

conditions, and limitations prescribed by the Board's Economic Regulations.

This permit shall be subject to the following terms, conditions, and limitations:

(1) Prior to the commencement of operations under this permit to either France or the United Kingdom, the holder shall elect to serve intermediate points in either France or the United Kingdom and shall notify the Government of the United States of its selection; the country not selected shall be deemed to be deleted from the permit.

(2) The holder may serve Montreal both as a point intermediate to and beyond New York.

The holder shall conform to the airworthiness and airman competency requirements prescribed by the Government of the Polish People's Republic for Polish international air service.

The holder shall not operate any aircraft under the authority granted by this permit unless the holder complies with operational safety requirements at least equivalent to Annex 6 of the Chicago Convention.

The initial tariff filed by the holder shall not set forth rates, fares, and charges lower than those then in effect for any U.S. air carrier in the same foreign air transportation: *However,* this limitation shall not apply to a tariff filed after the initial tariff regardless of whether this subsequent tariff is effective before or after the introduction of the authorized service.

This permit shall be subject to all applicable provisions of any treaty, convention, or agreement affecting

international air transportation now in effect, or that may become effective during the period this permit remains in effect, to which the United States and the Polish People's Republic shall be parties.

By accepting this permit, the holder waives any right it may possess to assert any defense of sovereign immunity from suit in any action or proceeding instituted against the holder in any court or other tribunal in the United States (or its territories or possessions) based upon any claim arising out of operations by the holder under this permit.

The holder shall keep on deposit with the Board a signed counterpart of CAB Agreement 18900, an agreement relating to liability limitations of the Warsaw Convention and the Hague Protocol approved by Board Order E-23680, May 13, 1966, and a signed counterpart of any amendment or amendments to such agreement which may be approved by the Board and to which the holder becomes a party.

The holder shall not provide foreign air transportation under this permit unless (1) there is in effect third-party liability insurance in the amount of $1,000,000 or more to meet potential liability claims which may arise in connection with its operations under this permit, and unless there is on file with the Docket Section of the Board a statement showing the name and address of the insurance carrier and the amounts and liability limits of the third-party liability insurance provided, and (2) unless there is in effect liability insurance sufficient to cover the obligations assumed in CAB Agreement 18900, and unless there is on file with the Docket Section of the Board a statement showing the name and address of the

insurance carrier and the amounts and liability limits of the passenger liability insurance provided. Upon request, the Board may authorize the holder to supply the name and address of an insurance syndicate in lieu of the names and addresses of the member insurers.

The exercise of the privileges granted shall be subject to such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Board.

This permit shall be effective on , and unless otherwise terminated as provided, shall terminate on March 31, 1982. Prior to the termination of this permit on March 31, 1982, this permit shall terminate (1) upon the effective date of any treaty, convention, or agreement, or amendment which shall have the effect of eliminating the route here authorized from the routes which may be operated by airlines designated by the Government of the Polish People's Republic (or in the event of the elimination of any part of the route here authorized, the authority should terminate to the extent of such elimination), or (2) upon the effective date of any permit granted by the Board to any other carrier designated by the Government of the Polish People's Republic in lieu of the holder, or (3) upon the termination or expiration of the Air Transport Agreement between the Government of the United States and the Government of the Polish People's Republic, dated July 19, 1972, as amended: *Provided,* that clause (3) shall not apply if, prior to the event specified in clause (3), the operation of the foreign air transportation here authorized becomes the subject of any treaty, convention, or agreement to which the United States and the Polish People's Republic are or shall become parties.

Lot Foreign Air Carrier Permit

The Civil Aeronautics Board through its Secretary, has executed this permit and affixed its seal on

Secretary

(Seal)

Affidavit of Abraham Meilen

UNITED STATES DISTRICT COURT
Eastern District of New York
MDL No. 441

ANGELA Y. ROBLES and MARGARET OJEDA, Co-Adminstrators of the Estate of YRENIO ROMAN ROBLES, JR., AKA JUNIOR ROBLES, Deceased,
Plaintiffs,

—against—

POLSKIE LINIE LOTNICZE, AKA LOT POLISH AIRLINES, PAN AMERICAN WORLD AIRWAYS, INC., a corporation, AMERICAN AIRLINES, INC., a corporation,
Defendants.

To Clerk:

This document pertains to Line Case No. CV-80-2977 (CPS) and should be filed in same.

AFFIDAVIT OF ABRAHAM MEILEN IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

Affidavit of Abraham Meilen

ABRAHAM MEILEN, being first duly sworn, deposes and says:

1. I am over 21 years of age and the Vice President of Meilen Press, Inc., 443-445 Greenwich Street, New York, New York, one of the official printers for the United States Court of Appeals for the Second Circuit. I have been an officer of Meilen Press since 1963 and I have been employed in various capacities in the printing industry since 1931. I submit this Affidavit based upon my own personal knowledge and if necessary I could testify competently to the facts contained herein.

2. I have carefully examined an original sample ticket of the type issued by LOT Polish Airlines to plaintiffs' decedent which is identical to the one attached as Exhibit "A" to the Affidavit of Krzysztof Z. Resich in opposition to the within motion, and the following are my observations with respect thereto.

3. Modern type is not a specific type face. The phrase "modern type" describes a variety of typefaces that were introduced to the printing trade approximately fifty years ago.

4. Printed matter contains 72 "points" per vertical inch. If no "leading" is used, 10 point type contains 7.2 lines of type per inch. "Leading" is a horizontal space between lines set into linotype.

5. If no "leading" is used, 8.5 point type contains 8.47 lines of type per inch. The "Advice to International Passengers on Limitation of Liability" in the LOT sample ticket was printed and then offset so that it appears

to be 8.5 point type. The process of offsetting reduces the print size somewhat and it is possible, therefore, that the original print of the "Advice to International Passengers on Limitation of Liability" in the LOT ticket was 10 point type and then was reduced in size during the offsetting process.

6. The primary difference between 8.5 point type and 10 point type is that 10 point type of a specific text face is somewhat larger than 8.5 point type of the same text face. As a result, 10 point type contains fewer lines of print per inch than 8.5 point type.

7. As illustrated by the United States Government Printing Office pamphlet *Specimens of Type Faces* (attached hereto as Exhibit "A"), 10 point type of one text face varies in appearance and readability from 10 point type of another text face. For example, "11 Point No. 21" (Linotype) type has the appearance of 11 point type while "Cheltenham Condensed" (Monotype) type has the appearance of being smaller than 10 point type. Both of these types as shown in the respective paragraphs of Exhibit "A", however, are printed in 10 point type.

8. The "Advice to International Passengers on Limitation of Liability" on page 4 of the LOT sample ticket is within the range of size of type faces listed in Exhibit "A" hereto. The "Advice to International Passengers on Limitation of Liability" in the LOT sample ticket is more readable than some of the 10 point type faces shown in Exhibit "A" and it is equally as readable as the majority of the type faces listed therein. It also is readily apparent that the print of the "Advice to International Passengers on Limitation of Liability" in the

Affidavit of Abraham Meilen

LOT ticket is larger than many of the samples of 10 point type size shown in Exhibit "A" hereto.

Abraham Meilen

Sworn to before me, this
23rd day of July, 1981

Peter Meilen
Notary Public

Peter Meilen
Notary Public, State of New York
No. 31-7036275
Qualified in New York County
Commission Expires March 30, 1982

Montreal Trust Co. v. Canadian Pacific Airlines, Ltd. (Ritchie, J.)

Supreme Court of Canada, Laskin, C.J.C., Martland, Judson, Ritchie, Spence, Pigeon and Dickson, JJ.

December 20, 1976.

Contracts—Carriage by air—Warsaw Convention, 1929—Tickets—Carrier required to give notice—Whether small inconspicuous print sufficient—Carriage by Air Act, R.S.C. 1970, c. 14, Sch. I, art. 3(1)(c).

By the *Carriage by Air Act*, R.S.C. 1970, c. C-14, Sch. I, incorporating the *Warsaw Convention, 1929*, as amended by The Hague Protocol, Sch. II (September 28, 1955, see 1963 (Can.), c. 33, s. 4), a carrier may limit its liability in respect of death or personal injury to passengers if (by art. 3(1)(*c*)) it delivers a ticket containing a notice referring to the *Warsaw Convention, 1929* and summarizing its effect. Before the amendment the text of the Convention had required a "statement" to a similar effect. A carrier delivered to a passenger a ticket containing a reference to the Convention in small and inconspicuous print. In an action to recover damages for the death of the passenger the trial Judge held that insufficient notice had been given to entitle the carrier to the benefit of the Convention. An appeal to the Quebec Court of Appeal was allowed. On further appeal to the Supreme Court of Canada, *held*, allowing the appeal, small print that was inconspicuous did not constitute a "notice" within the meaning of the amended Convention, though it might have been a "statement" within the meaning of the original text. A "notice" must be something in a form calculated to attract attention.

Montreal Trust Co. v. Canadian Pacific Airlines, Ltd.
(Ritchie, J.)

Per Judson, J., Martland and Pigeon, JJ., concurring, dissenting: The decision of the Quebec Court of Appeal should be affirmed since the notice was reasonably legible and comprehensible.

[*Ludecke* v. *Canadian Pacific Airlines Ltd.* (1974), 53 D.L.R. (3d) 636, distd; *Mertens* v. *Flying Tiger Line, Inc.* (1965), 341 F. 2d 851; *Lisi* v. *Alitalia-Linee Aeree Italiene* (*sic*) (1966), 370 F. 2d 508, affg 253 F. Supp. 237, refd to]

APPEAL from a decision of the Quebec Court of Appeal allowing an appeal from a judgment of Challies, A.C.J., in favour of the plaintiff in an action to recover damages for the death of an air line passenger.

Peter R. Lack, for appellants.

W. Tyndale, Q.C., and *Alastair Paterson*, Q.C., for respondent.

D. Jack, for intervenant, Dora Hallam.

LASKIN, C.J.C., concurs with RITCHIE, J.

MARTLAND, J., concurs with JUDSON, J.

JUDSON, J. (dissenting):—The Quebec Court of Appeal has stated the issues in this appeal in clear and simple terms. First, did the ticket which was issued to the deceased passenger comply with the requirements of the *Warsaw Convention, 1929*, as amended by The Hague Protocol, so as to limit the carrier's liability? Second, was this notice reasonably legible and comprehensible? Their answer to both questions was "Yes" and they allowed the appeal and dismissed the action.

I agree entirely with their reasons for judgment and I would dismiss this appeal.

Montreal Trust Co. v. Canadian Pacific Airlines, Ltd.
(Ritchie, J.)

RITCHIE, J.:—This is an appeal from a judgment of the Court of Appeal of the Province of Quebec allowing an appeal from the judgment rendered at trial by Challies, A.C.J., and declaring that Canadian Pacific Airlines Limited was entitled to limit its liability in accordance with the provisions of art. 22 of the First Schedule of "An Act to amend the Carriage by Air Act" (The Hague Protocol), 1963 (Can.), c. 33, s. 3, with respect both to the death of the late Irving Joseph Stampleman and to the loss of his baggage as a result of the crash of one of the respondent's aircraft at Tokyo on March 4, 1966.

The appellants being the executor and the two surviving sons of the late Stampleman, commenced this action by writ of summons and declaration dated February 24, 1964, and submitted the following question of law for the decision of the Court in accordance with a joint statement of law and fact filed pursuant to art. 448 of the *Code of Civil Procedure*, 1965 (Que.), c. 80:

Question of Law

> That this submission relates and applies solely and exclusively to the question of law as to whether, based upon the facts hereinabove set forth and the contents of the Exhibits forming part of the said facts, the Defendant is entitled to avail itself of the provisions of Article 22 of the First Schedule of the aforesaid "Act to amend the Carriage by Air Act (the Hague Protocol) which limites (*sic*) the liability of the Defendant towards Plaintiffs as to the amount of damages payable by

Montreal Trust Co. v. Canadian Pacific Airlines, Ltd.
(Ritchie, J.)

> Defendant to Plaintiffs as a result of the death of Joseph Irving Stampleman in the crash of Defendant's aircraft at Tokyo International Airport, Tokyo, Japan on March 4, 1966 and as a result of the loss or destruction of the registered baggage of the late Mr. Stampleman.

The rights and liabilities of the parties are governed by the *Carriage by Air Act*, R.S.C. 1970, c. C-14, Sch. I, which incorporates in the law of Canada the French text of the *Warsaw Convention, 1929* as amended at The Hague in 1955, Sch. II (hereinafter referred to as "The Hague Protocol").

At the time of the crash Joseph Stampleman was travelling under a ticket issued by Air Canada on its own behalf and on behalf of successive carriers including the respondent. The ticket served as both passenger ticket and baggage check and the contemplated voyage was from Montreal to Vancouver to Hong Kong to Tokyo and return to Montreal. At the relevant time Canada, unlike the United Kingdom and Japan, was one of the high contracting parties to The Hague Protocol and it is the fact that the round trip began and ended in Canada which makes that the governing document.

The air ticket and baggage check in question are attached as exhibits to the agreed statement of facts and their contents are well summarized in the reasons for judgment of Mr. Justice Challies where he says:

> The ticket and baggage check, exs. P-1 and P-2 (ticket No. 014491120008), issued to the deceased by Air Canada contains near the top "subject to conditions of contract on page 2" which is readable

> with the naked eye and also in four and a half point type across the bottom the following reference to the Warsaw Convention: "If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and the convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage."

Less than a month before rendering judgment in the present case (*i.e.*, December 31, 1971) Challies, A.C.J., had decided the case of *Ludecke* v. *Canadian Pacific Airlines Ltd.*, S.C.M. 746 832, in the Superior Court. That case arose out of the death of a passenger in the same air crash as Stampleman and the agreed question of law there posed under art. 448, *C.C.P.*, was similar in all respect to the question here at issue except that in the case of *Ludecke* it related to the defendant's right to limit its liability in accordance with the provisions of the *Warsaw Convention, 1929* whereas the present question is directed to the rights under The Hague Protocol amending that Convention.

In the *Ludecke* case Challies, A.C.J., held that the statement in the air ticket in question that "carriage is subject to the rules and limitation in relation to liability established by the Convention" printed as it was in four and a half point type was not a "Statement" as required by art. 4 of the Convention and that the carrier was therefore not entitled to limit its liability as to baggage but that it was covered by the limitation provision with

respect to the limitation provision for loss of life because of the wording of art. 3 of the Convention.

In the same case, Casey, J.A., speaking for the Court of Appeal (1974), 53 D.L.R. (3d) 636, found that the "statements" in four and a half point type in the ticket were reasonably readable and constituted compliance with the requirements of arts. 3 and 4 of the Convention so as to entitle the carrier to limit its liability as to any baggage claim and the claim for loss of life.

This judgment was not rendered until December 23, 1974. In the meantime (*i.e.*, December 31, 1971), Challies, A.C.J., rendered a judgment for the Superior Court in the present case in which he recognized the difference in wording between arts. 3 and 4 of the Convention which governed the *Ludecke* case and those articles as they had been amended by The Hague Protocol which governed here, but nevertheless stated that "for the reasons given by the undersigned in *Ludecke* v. *C.P.A.*", the carrier was not entitled to limit its liability as to either loss of life or loss of baggage.

In reversing this judgment, Casey, J.A., speaking on behalf of the Court of Appeal, concluded by saying of The Hague Protocol:

> There are only two questions involved—did the ticket include the notice required by arts. 3(1)(*c*) and 4(1)(*c*) and was this notice reasonably legible and comprehensible. As in the case of *Ludecke* my answer to both questions is yes and for this reason I would maintain this appeal.

In my view the answer to the question raised by this appeal must depend upon whether or not the Court of

Appeal was justified in relying upon its own interpretation of arts. 3 and 4 of the Convention in deciding a case which is governed by the same articles as amended by The Hague Protocol. The determination of this issue requires a consideration of the terms of these articles which provide:

WARSAW CONVENTION

Article 3

(1) For the carriage of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

. . . . .

(*e*) a statement that the carriage is subject to the rules relating to liability established by this Convention.

(2) The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to the rules of this Convention. Nevertheless, *if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this Convention which exclude or limit his liability.*

Article 4

(1) For the carriage of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

. . . . .

(3) The baggage check shall contain the following particulars:

(*h*) a statement that the carriage is subject to the rules relating to liability established by this Convention.

(4) The absence, irregularity or loss of the baggage check does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to the rules of the Convention. Nevertheless if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out in . . . . and (*h*) above, the carrier shall not be entitled to avail himself of those provisions of the Convention which exclude or limit his liability.

(The italics are my own.)

THE HAGUE PROTOCOL

Article 3

(1) In respect to the carriage of passengers a ticket shall be delivered containing:

. . . . .

(*c*) a *notice* to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers *for death or personal injury and in respect of loss of or damage to baggage.*

(2) The passenger ticket shall constitute *prima facie* evidence of the conclusion and conditions of the contract of carriage. The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, *or if the ticket does not include the notice required by paragraph (1)(c) of this article, the carrier shall not be entitled to avail himself of the provisions of Article 22.*

Article 4

[The relevant portions of which read:]

(1) In respect of the carriage of registered baggage, a baggage check shall be delivered, which, unless combined with or incorporated in a passenger ticket which complies with the provisions of Article 3, paragraph (1), shall contain:

. . . . .

(*c*) a notice to the effect that, if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers in respect to loss of or damage to baggage.

The Hague amendments, in so far as they affect the present issue, are notable for the fact that (1) the Convention simply required the inclusion in the ticket of "a statement" relating to the limitation of the liability of the carrier as established by the Convention, whereas the amendment provided that such a statement should take the form of a "notice", and (2) that the amendment provided that in the absence of a "notice" the carrier is not entitled to avail himself of the limitation provisions in respect either of death or loss of baggage, whereas the Convention contains no such sanction with respect to claims for loss of life except in the case of no passenger ticket "having been delivered" to the claimant.

In holding that the company was not entitled to limit its liability for loss of the baggage in the *Ludecke* case, Challies, A.C.J., relied heavily on a number of American authorities to the effect that the "statement" in the ticket required by the Convention must be in such form as to afford the passenger "a reasonable opportunity to take self-protective" measures to compensate himself for the limitation on his rights which art. 22 creates in favour of the carrier.

The cases of *Mertens* v. *Flying Tiger Line, Inc.* (1965), 341 F. 2d 851, and *Lisi* v. *Alitalia-Linee Aeree Italiene* (*sic*) (1966), 370 F. 2d 508, are cited with approval by Mr. Justice Challies. In the latter case, MacMahon, D.J. [253 F. Supp. 237 at p. 243], speaking of a ticket containing the required "statement" in the same print as that in the present case, described it as "virtually invisible" and also as "diminutively sized and unemphasized by bold face type, contrasting colour, or anything else".

In allowing the appeal in the *Ludecke* case, Casey, J.A., declined to follow the American authorities, saying [at p. 638]:

> What I cannot concede is that we must accept the decisions cited by appellant as establishing the standards by which the legibility of this "statement" must be judged. My view is that on this matter of fact the Convention should contain its own criteria. Since it does not I see no reason why we should treat this case differently from the others that come before this Court. Proceeding from this premise and having examined the relevant documents I conclude that the Carrier did print these "statements" in reasonably readable type.

I think it must be understood that limitation on the liability of the carrier created by art. 22 of the Convention in both its original and its amended form constitutes an encroachment on the rights of the individual passenger and as such it is to be strictly construed and can only be invoked when the requirements of the article have been exactly complied with.

The effect of art. 3(2) of the Convention was to empower carriers to limit their liability to passengers by the simple process of delivering a ticket containing a "statement that the carriage is subject to the rules relating to liability established by the Convention" and the Court of Appeals has held in the *Ludecke* case that this requirement is met even when the "statement" is inconspicuously placed in four and a half point type. When the amendments were made by the Hague Protocol of 1955, an entirely new art. 3(2) was promulgated in which the requirement of a mere "statement" was deleted and the more elaborate provisions of the Protocol were substituted therefor. Under the amended art. 3(1)(*c*), the carrier is not only required to insert a "notice" but the terms of the notice are expressly provided for.

I do not think it can be assumed that the draftsmen of The Hague Protocol made the extensive changes which they did in art. 3 without weighing the words which they employed with some care and I cannot accept the suggestion that the substitution of the word "notice" for "statement" in arts. 3 and 4 was meaningless or ineffective. The French text of the Protocol governs its construction in case of any doubt and it was argued that the word "avis" bears a somewhat stronger meaning than "notice", but I do not need to base any conclusion on that argument as I am satisfied that both "a notice" or "un avis" mean at least something which is in a form calculated to attract attention.

As I have pointed out, Mr. Justice Casey in the course of his reasons for judgment in the *Ludecke* case, indicated his view "that on the matters of fact as to whether the 'statement' was sufficiently legible the Conven-

tion should contain its own criteria" and he considered that it did not do so. Had he been considering art. 3 (1)(*c*) of the Protocol, the learned Judge might have reached a different conclusion as it appears to me that that article does contain its own criteria, namely, that the statement shall be in such form as to constitute a "notice". Even if it were accepted that the four and one-half point type in which the requisite notice is reproduced at the foot of the first page of the ticket is reasonably readable, it cannot, in my view, be described as noticeable and it is not in a form which would attract the attention of the passenger in contradistinction to all the other material printed in the same type on the ticket. In relation to a claim for loss of life, art. 3(1) of the Convention, as I have said, merely required "a statement" and furthermore under that article the absence of that "statement" did not preclude the carrier from limiting its liability provided that the ticket was "delivered". The amended article as contained in the Protocol not only requires a "notice" but the absence of such "notice" denies the carrier the benefit of art. 22. The "notice" required by the Protocol and the statement required by the Convention are therefore two completely different requirements with radically different effects and with the greatest respect I think that the Court of Appeal erred in applying the reasoning which had been used in the *Ludecke* case in interpreting the Convention to the interpretation of the Protocol in the present case.

As I have indicated, I am of opinion that the four and one-half point type reproduction of the material required to be inscribed by art. 3(1)(*c*) of the Protocol was not a "notice" within the meaning of that article

and accordingly the carrier is not entitled to avail itself of the provisions of art. 22.

For all these reasons I would allow this appeal, set aside the judgment of the Court of Appeal and direct that the question here submitted for determination be answered in the negative and that the respondent is not entitled to avail itself of provisions of art. 22 of the First Schedule to The Hague Protocol so as to limit its liability to the appellants as to the amount of damages payable as a result of the death of the late Joseph Irving Stampleman at Tokyo International Airport on March 4, 1966, and as a result of the loss or destruction of the registered baggage of the said Mr. Stampleman, the check for which was incorporated in his ticket.

The appellants will have their costs both here in the Court of Appeal.

SPENCE, J., concurs with RITCHIE, J.

PIGEON, J., concurs with JUDSON, J.

DICKSON, J., concurs with RITCHIE, J.

Appeal allowed.